IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 178 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHUNILAL FATIYABHAI VASAVA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Appellant(s) : 1,
MS HANSABEN PUNANI Ld. APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 30/07/2007

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal is preferred under sec. 374 of CrPC and directed against the judgment passed in Sessions Case No. 88/2001 by the learned Addl. Sessions Judge, Bharuch imposing sentence on the appellant – accused for the offence punishable under sec. 363 of IPC for 7 years R/I and fine of Rs. 500/-, in default, S/I for one month, under sec. 366 of IPC for 10 years R/I and fine of Rs. 1000/-, in default, S/I for two months and under sec. 376 of IPC R/I for 10 years and fine of Rs. 1000/-, in default, S/I for two months. It is held by the learned Addl. Sessions Judge that the sentence imposed shall run concurrently.

2. The short facts giving rise to the present appeal are as under:

3. As per the prosecution case, on 20.5.2000 at about 6.00 O'clock in the morning , the appellant induced prosecutrix, aged 17 years of village Avidha and took her from the lawful custody of her parents with a view to commit illicit intercourse with her and, thereby he has committed the offence punishable under sec. 363 and 366 of IPC. After inducing her, the accused took the prosecutrix to various places

and repeatedly committed rape on her and, thereby, he has also committed the offence punishable under sec. 376 of IPC. The complaint was given by the father of the prosecutrix on 5.7.2000 to the Jaghadia Police Station. On the strength of the complaint given by the Sukhdevbhai, offence was registered under sec. 363, 366 and 376 of IPC. The place where the actual rape was committed was visited by the Investigating Officer and the panchnama with regard to the place of incident was prepared in the presence of panch witnesses. The statements of the witnesses were recorded from the neighbourhood. The statement of the victim was also recorded. The clothes put on by the victim as well as appellant were seized and panchnama in that regard was prepared. The victim as well as accused were taken to the hospital for the purpose of examination. After obtaining necessary certificate from the hospital, the mudammal was sent along with the samples of blood and sample of semen to the FSL for the purpose of detailed analysis. On receipt of the FSL report and other material in the case, the appellant was charge-sheeted and arrested on 6.7.2000 at about 14.10 hrs and produced before the ld. Judicial Magistrate First Class, Jaghadia, who sent him to judicial custody. The appellant thereafter

preferred Criminal Misc. Application No. 566 of 2000 and was released on bail by the Court. As the matter was triable by the Sessions Court, the learned Judicial Magistrate First Class, Jaghadia under sec. 209 of CrPC made over the case on 27.3.2001 to the Sessions Court, Bharuch. The charge against the appellant has been framed vide Exh. 1 for the offences punishable under sec. 363, 366 and 376 of IPC and appellant pleaded not guilty to the charge levelled against him, therefore, the matter was set down for full-fledge trial before the Sessions Court.

4. The prosecution has examined following witnesses in order to bring home the guilt against the appellant:

(i) PW-1 Sukhadev Ukkadbhai Vasava Ex. 7
(ii) PW-2 Ushaben Sukhadevbhai Vasava Ex. 9
(iii) PW-3 Dinesh Sukhadevbhai Vasava Ex. 10
(iv) PW-4 Savitaben Sukhdevbhai Vasava Ex.11
(v) PW-5 Bipinbhai Ratilal Ex. 13
(vi) PW-6 Nanubhai Bhailalbhai Ex. 15
(vii) PW-7 Rameshbhai Shivram Bhatt Ex. 20
(viii) PW-8 Rajendrakumar Ramsingbhai Bhil Ex. 24
(ix) PW-9 Dr. Rinaben Utpalbhai Shah Ex. 27
(x) PW-10 Hirabhai Nathubhai Parmar Ex. 29
(xi) PW-11Hasambhai Hariyabhai Vasava Ex. 30
(xii) PW-12 Parsottambhai Madhavbhai Ex. 31
(xiii) PW-13Fatesing Shankarbhai (Head Constable) Ex.35
(xiv) PW-14 Kanakben Rasalbhai (Head Constable) Ex. 36
(xv) PW-15 Dr. Sanjay Parikh Ex. 37
(xvi) PW-16 Shobhanaben Jitendrabhai (Officer,

FSL) Ex.42
(xvii) PW-17Bhogilal Manubhai (P.S.O.) Ex. 46
(xviii) PW-18 Himatsinh Natvarsinh Rathod (I.O.) Ex. 47

5. The prosecution has also produced following documentary evidence. They are as under:

(i) Original complaint Ex. 8
(ii) True copy of School Leaving Certificate of Vinay Vidhyamandir, Avidha of the victim Ex.14
(iii) Panchnama of the clothes put on by victim Ex. 16
(iv) Panchnama of the clothes produced by the accused Ex. 21
(v) True copy of Ori. Station Diary Ex. 25
(vi) Sonography report of Ushaben Ex. 28
(vii) Case papers of Govt. Hospital of victim Ex. 38
(viii) Medical report of victim Ex. 39
(ix) Case papers of victim Ex. 40
(x) Medical report of victim Ex. 41
(xi) Letter written by Director, FSL to PSI, Jaghadia Ex. 43
(xii) Report of serology Ex. 45
(xiii) Case papers of Ushaben ex. 48 etc.

6. At the conclusion of the trial, further statement of the appellant was recorded under sec. 313 of CrPC and appellant has stated that he married prosecutrix as per the Hindu Religious Rites and as the fact of his marriage with the prosecutrix was not acceptable to her parents, he was falsely implicated in the case.

7. The learned Addl. Sessions Judge after going through the entire gamut of oral as well as documentary evidence produced by the prosecution held that the prosecutrix was induced by the appellant on 20.5.2000 at about 6.00 O'clock in the morning at village Avidha. After inducing the prosecutrix who was aged 17 years and taking her from the lawful guardianship of her parents, he committed illicit intercourse with prosecutrix and, thereby, the appellant has committed offences under sec. 363 as well as 366 of IPC. The learned Judge further held that on the basis of the deposition adduced by the prosecutrix vide Ex. 9 and the complainant Sukhadevbhai vide Ex. 7 as well as by the mother of the victim Savitaben vide Ex. 11, the prosecution has established that the appellant after inducing the prosecutrix and taking her from the lawful custody of her parents with a view to commit illicit intercourse at different places also committed the offence under sec. 376 of IPC. As the prosecution has adduced cogent and convincing evidences indicating the involvement of the appellant in the commission of crime alleged against him, the learned Judge convicted the appellant and imposed sentence on the

appellant – accused for the offence punishable under sec. 363 of IPC for 7 years R/I and fine of Rs. 500/-, in default, S/I for one month, under sec. 366 of IPC for 10 years R/I and fine of Rs. 1000/-, in default, S/I for two months and under sec. 376 of IPC R/I for 10 years and fine of Rs. 1000/-, in default, S/I for two months.

8. The learned advocate Ms. Sadhanaben Sagar representing the appellant submitted that the charge against the appellant is framed vide Ex. 1 for the offence punishable under sec. 363, 366 and 376 of IPC. The prosecutrix in the present case is examined vide Ex. 9. On perusal of her deposition, it becomes clear that the appellant had not committed rape on her as alleged by the prosecution. She has stated in her deposition that on the date of the incident i.e. on 20.5.2000, she was taken by the appellant at 6.00 O'clock in the morning from the village Avidha without her consent. She was also given threat by the appellant – accused not to disclose this fact to anyone. In the cross-examination, she has completely changed her version. She has deposed in the cross-examination that no force was used by the appellant in committing intercourse with her and she stayed

with the appellant as his wife. She had not disclosed the fact to anyone about the intercourse which she had with the appellant on the next day. Thus, the deposition adduced by the prosecutrix does not inspires the necessary confidence so as to convict the appellant for the commission of the offence with which he has been charged. Complainant Sukhadevbhai is examined vide Ex. 7 and the mother of the victim Savitaben is examined vide Ex. 11, but, nothing turns out from the deposition adduced by the parents of the prosecutrix. The complaint was given by Sukhadevbhai on 5.7.2000 to the Jaghadia Police Station. In his complaint, he has narrated as to how inducement or allurement was given to his daughter and after giving inducement how the appellant took his daughter from his lawful custody. The complaint was given with regard to kidnapping of his daughter by the appellant on 5.7.2000. Thus, on perusal of the complaint given by the appellant, it is nowhere stated therein that the appellant had committed illicit intercourse with the prosecutrix after giving inducement to her and, therefore, the basic ingredients of Sec. 376 of IPC cannot be said to have been proved by the prosecution in a conclusive manner. Learned advocate after placing reliance on the oral deposition adduced by

rest of the witnesses, submitted that it is true that she was aged approximately 17 years when the incident in question took place and that fact is also reflected in the School Leaving Certificate issued by Vinay Vidhyamandir, Avidha vide Ex. 14. However, considering the consent given by the prosecutrix to the appellant, the act of the appellant cannot be termed as rape within the meaning of sec. 376 of IPC. Even on the perusal of the deposition adduced by the prosecution, the appellant married with the prosecutrix as per Hindu Religious Rites and he never took the prosecutrix from the lawful custody of her parents. Thus, the offence punishable under sec.363 and 366 even could not be established by the prosecution in a cogent and conclusive manner. In view of the deposition adduced by the prosecution the learned advocate submitted that the prosecution has miserably failed to prove the involvement of the appellant in the commission of the offence and, therefore, the appellant be acquitted forthwith in the matter.

9. Learned APP Ms. Hansaben Punani representing the respondent – State vehementaly submitted that the prosecutrix has given the deposition vide Ex. 9,

wherein, she has narrated as to how she was induced by the appellant and after giving inducement she was taken to different places where rape was committed by the appellant with impunity. The deposition adduced by the prosecutrix gets necessary supports from the oral evidence adduced by Sukhadevbhai PW-1 Ex. 7 and Savitaben Sukhadevbhai PW-4 Ex. 11, wherein, both the parents have deposed about kidnapping of their daughter on 20.5.2000 at 6.00 O'clock in the morming from village Avidha. The complaint was given by Sukhadev on 5.7.2000 and the same is produced vide Ex. 8. It further corroborates the deposition adduced by the victim and the parents of the victim. Learned APP submitted that Bipinbhai Ratilalbhai PW-5 has been examined at Ex. 13. He had produced School Leaving Certificate at Ex. 14, wherein, the date of birth of the prosecutrix is mentioned as 29.11.1982. The incident in question took place on 20.5.2000. Thus, on the date of the incident, she was approximately 17 years of age. The panchnama with regard to the place of the incident as well as clothes put on by the victim and appellant further supports the prosecution case with regard to the involvement of the appellant in the commission of the offence. The mudammal which was seized was sent to

the FSL and the report of the detailed analysis given by FSL is produced to prove the involvement of the appellant in the commission of the offence. The certificate given by the Civil Hospital is produced at Ex. 38. Dr. Rinaben Utpal Shah PW-9 Ex. 27, has narrated in the deposition about the radiological test conducted by the hospital on the victim. Thus, considering the overwhelming oral deposition and the documentary evidences relied upon by the prosecution, the prosecution has established the involvement of the appellant in the commission of the offence under sec. 363, 366 and 376 of IPC. In view of he aforesaid facts and circumstances of the case, learned APP submitted that the appellant has not made out a case for acquittal and the order of sentence and fine imposed by the learned Addl. Sessions Judge, Bharuch under sec. 363, 366 and 376 of IPC be confirmed and appeal preferred by the appellant be dismissed.

10. We have heard Ms. Sadhanaben Sagar learned advocate for the appellant and Ms. Hansaben Punani learned APP for the respondent – State and perused the oral as well as documentary evidences on the record of this case.

11. As per the prosecution case, the charge against the appellant was framed vide Ex. 1 for the offence punishable under sec. 363, 366 and 376 of IPC. The prosecutrix has been examined vide Ex. 9. She has deposed in her testimony that on the date of incident i.e. on 20.5.2000, she was given inducement by the appellant and at about 6.00 O'clock in the morning he took her from the lawful guardianship of her parents. She was given threat and the appellant after giving threat committed illicit intercourse with her. However, on perusal of the cross-examination, she has narrated somewhat different story. She has stated in her cross-examination that no force was used by the appellant while performing intercourse. She lived with the appellant at different places as his wife. She had permanent relationship with the appellant. She had not taken any help from anyone during the period when the appellant repeatedly had intercourse with her. Thus, on the perusal of the cross-examination of the prosecutrix, it becomes abundantly clear that on one hand she implicates the appellant in the commission of offence under sec. 363 and 366 of IPC but on the other hand, with regard to the rape, in the cross-examination, she has deposed that

no force was used by the appellant while committing intercourse with her. The complainant Sukhadevbhai PW-1 is examined at Ex.7. He has narrated the incident which took place on 20.5.2000 at about 6.00 O'clock in the morning. As per the deposition adduced by Sukhadevbhai, the appellant after giving inducement and allurement to his daughter took her from his lawful custody and had committed illicit intercourse with his daughter. Savitaben, mother of the victim PW-4 examined at Ex. 11, has also reiterated the aforesaid facts in her deposition. The complaint was given by Sukhadevbhai, wherein, he has narrated as to how his daughter was given inducement by the appellant on 20.5.2000 and after giving inducement how the appellant took his daughter from the lawful custody and committed illicit intercourse with her. The prosecution has also examined Dineshbhai Sukhadevbhai Vasava, who is the brother of victim and he has also narrated the story with regard to elopement of his sister by the appellant on 20.5.2000. The prosecution has examined Bipinbhai Patel PW-5 Ex. 13 in order to establish that the prosecutrix was approximately aged 17 years on the date of incident. The certificate issued by Shri Vinay Vidhya Mandir, Avidha is produced at Ex. 14.

Nanubhai Bhailalbhai PW-6 is panch witness examined vide Ex. 15, but he has not supported the prosecution case. Likewise, Rameshbhai Shivram Bhatt PW-7 vide Ex. 20, Hirabhai Nathubhai Parmar PW-10 vide Ex. 29 have not supported the prosecution case in any manner whatsoever. The prosecution has examined Rajendrakumar Ramsingbhai PW-8 vide Ex. 24 who had recorded the complaint given by Sukhadevbhai and the abstract of the Station Diary is produced by this witness during the course of his deposition at Ex. 24. The Doctor who had carried out ossification test on prosecutrix is examined vide Ex. 37 and the certificate given by Civil Hospital, Bharuch is produced at Ex. 28. Hasambhai Hariyabhai Vasava PW-11 is examined vide Ex. 30. He is a panch witness, who has deposed in his testimony as to how clothes put on by the victim were seized and the panchnama in that regard was prepared in his presence. Parshottambhai Madhavbhai Vasava PW-12 Ex. 30 is the brother-in-law of Sukhadevbhai. He has narrated the incident which took place on 20.5.2000. Fatesing Shankarbhai PW-13 Ex. 35 and Kanakben Rasalbhai PW-14 Ex. 36 are examined with a view to prove the investigation of the case and how the medical examination of the prosecutrix was carried out by sending her to Civil

Hospital at Bharuch. Dr. Sanjay Parikh PW-15 Ex. 37 had examined the appellant and after examining the appellant, he gave the certificate to the appellant. Shobhanaben Jitendrabhai PW-16 is examined at Ex. 14. She is the officer working in the FSL, Surat and she had carried out the test and submitted the report. The prosecution has also produced detailed analysis report vide Ex. 43 and Ex. 44. Amarsinh Kanusinh Chauhan is examined as defence witness vide Ex. 52. He has been examined in order to prove that marriage took place between prosecutrix and the appellant. As per his deposition, the appellant had put his thumb impression and the prosecutrix had also put her signature in the certificate. The thumb impression put by the appellant was identified by one K.Z. Modi. The certificate of marriage is also produced vide Ex. 53. Rashmikant Balvantrav Jadav is examined vide Ex. 55 on behalf of defence side and he has deposed in his testimony that on 6.6.2000 when he was working as Deputy Mamlatdar (Revenue) at Ankleshwar, he was accosted by one lawyer Kamlesh Modi. The lawyer was accompanied by the prosecutrix. She wanted to file affidavit and on being asked about the correctness of the contents of the affidavit, she had submitted that same were correct and after understanding the

contents of the affidavit, she had put her signature below the same. After the aforesaid formality, he had put his seal and signature.

12. Thus, on the perusal of overall oral and the documentary evidences produced in the present case, the prosecution, in our considered view, has no doubt proved the ingredients of sec. 363 and 366 of IPC. It becomes amply clear on perusal of the deposition adduced by the prosecution that prosecutrix was induced by the appellant on 20.5.2000 at about 6.00 O'clock in the morning. After giving inducement and allurement, she was taken to different places by the appellant. After taking her to different places, she was repeatedly raped. The fact with regard to the kidnapping of the prosecutrix has been established by the prosecution by adducing cogent, convincing and conclusive evidence. Even the certificate issued by the school authority and produced at ex. 14 makes it abundantly clear that on the date of the incident, she was below 18 years of age. Thus, the prosecution has proved the involvement of the appellant in the commission of the offence under sec. 363 and 366 of IPC. However, on overall perusal of the deposition adduced by the prosecution more particularly the

prosecutrix vide ex. 9 the commission of illicit intercourse or rape with her by the appellant is not established by the prosecution. The prosecutrix has narrated different story with regard to the commission of rape in the examination-in-chief as well as in her cross-examination and, therefore, the same, in our view, does not inspire necessary confidence so as to indicate the involvement of the appellant in the commission of the offence. The deposition adduced by her parents could be of no help to the prosecution case in any manner whatsoever. Thus, the story of the prosecution with regard to the rape committed by the appellant on the prosecution is not conclusively established and it raises doubt. Even the defence witnesses who are examined in the present case makes it clear that the marriage was registered of the appellant with the prosecutrix and the certificate is also produced in that behalf. It is also narrated by the appellant in his statement under sec. 313 of CrPC that he had married the victim and as the acceptance of his marriage was not approved by the parents of the victim, he has been falsely implicated in the commission of the offence. Be that as it may. The story of the prosecution, in our considered view,

with regard to the commission of the rape by the appellant on the prosecutrix is not conclusively established. Therefore, the appellant, in our view, cannot be convicted for the offence punishable under sec. 376 of IPC. However, considering the fact that prosecutrix was induced by giving allurement by the appellant and the fact that he had taken the prosecutrix from the lawful guardianship of her parents, makes it abundantly clear that appellant had committed the offence punishable under sec. 363 and 366 of IPC. In light of the foregoing discussion, we pass the following order:

13. This appeal is partly allowed. The appellant is convicted for the offences punishable under sec. 363 and 366 of IPC and he is acquitted for the offence punishable under sec. 376 of IPC. However, in view of the conviction of the appellant under sec. 363 and 366 of IPC, we impose the sentence on the appellant under sec. 363 to undego 7 years R/I and fine of Rs. 500/-, in default, further S/I for one month, while under sec. 366 of IPC, instead of 10 years R/I, we impose the sentence of 7 years R/I and a fine of Rs. 1000/-, in default, further S/I of two months. Mudammal article is ordered to be destroyed as per

the observation made by the learned Addl. Sessions Judge, Bharuch.

(A.R. DAVE, J.)

(H.B. ANTANI, J.)

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